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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER,

v.

SEATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP COMPANY; AND UNITED STATES OF AMERICA, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Appendix to the Petition for a Writ of Certiorari, hereinafter P.A., 17-50) is reported at 460 F.2d 932. The Federal Maritime Commission's order dated October 27, 1970, *Approval of Agreement No. 9903 and Denial of Request for Hearing and Investigation,* not reported in the FMC reports, is found at P.A. 51-54. The Federal Maritime Commission's *Denial of Petition to Reopen the Matter of Approval of Agreement No. 9903,* dated

December 8, 1970, also unreported, appears at P.A. 55-57.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1972. (App. 70-71). The petition for a writ of certiorari was filed June 20, 1972, and was granted December 11, 1972. The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 2350.

ISSUE PRESENTED

Whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act, 1916, over agreements providing for the acquisition of assets of one carrier by another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, as amended, 39 Stat. 733, 46 U.S.C. § 814, provides in pertinent part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing,

or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * *

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

STATEMENT

1. *The Acquisition Agreement.*

Pacific Far East Line (PFEL) and The Oceanic Steamship Company (Oceanic), common carriers by water in the foreign commerce of the United States, submitted to the Federal Maritime Commission (Commission or FMC) on October 6, 1970, an agreement[1] providing for the sale and transfer to PFEL of four Oceanic vessels in current operation and its interest in two ships then under construction. Included under the transfer agreement were all personnel and shoreside

[1] This agreement, which was assigned FMC No. 9903, is reproduced in part at App. 2-32.

equipment and facilities of Oceanic related to the vessels. While all of its assets were included in this transfer, Oceanic, a wholly-owned subsidiary of Matson Navigation Company, was to retain its corporate existence and was not prohibited from re-entering its former trade or any other trade. The transfer agreement was submitted for Commission determination as to whether it was subject to the approval requirements and antitrust immunity under Section 15 of the Shipping Act, 1916.[2]

Notice of the agreement was published in the *Federal Register* on October 14, 1970. On October 21, 1970, Seatrain Lines, Inc., also a common carrier by water in the United States foreign commerce, protested approval of the agreement and requested a hearing.[3]

2. *FMC Proceedings.*

On October 27, 1970, the Commission denied[4] Seatrain's request for hearing and approved the agree-

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[2] See letter of transmittal and supplement thereto at App. 33, 34.

[3] App. 35-37.

[4] Denial of the request for hearing and approval of the agreement was predicated on Seatrain's failure to show any immediate likelihood of real injury as a result of such approval since Seatrain's entry into the trade in question at that time was conjectural and nothing in the agreement would preclude such entry at a future time. While the failure to hold a hearing was noted in the opinion below (P.A. 48), the Commission, acting upon the holding in *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577 at 587 (D.C. Cir. 1969) "if no substantial issues are raised it may then be proper for the Commission to proceed and approve the agreement," found that Seatrain's protest presented no real, immediate or substantial issue. See P.A. at 53.

ment.[5] Whereupon, Seatrain sought reopening for reconsideration of the Commission order of approval.[6] On December 8, 1970, the Commission denied the motion for reconsideration on the ground that Seatrain had raised nothing to show that approval had been improper.[7]

3. *Court Proceedings.*

On February 8, 1971, Seatrain petitioned the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 2342(3) for review of the Commission's order approving the agreement. The principal basis for Seatrain's petition was that the Commission erred in failing to hold a hearing prior to approval of the agreement despite Seatrain's timely protest. However, the Department of Justice, statutory respondent representing the United States and challenging the Commission's Section 15 authority over mergers and acquisitions between ocean-going carriers in another proceeding,[8] again raised the juris-

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[5] See Commission Order dated October 27, 1970, P.A. 51-54.

[6] App. 41-51.

[7] See Commission Order dated December 8, 1970, P.A. 55-57.

[8] In *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F.Supp. 656 (D.N.J. 1971), the Commission's Section 15 authority over acquisitions and mergers and its primary jurisdiction under the doctrine of *Far East Conference* v. *United States*, 342 U.S. 570 (1952), was challeneged by the Department of Justice, which brought an antitrust action in the District Court of New Jersey to enjoin the implementation of an agreement then pending before the Commission, the proposed acquisition of United States Lines, a common carrier by water, by R. J. Reynolds Tobacco Company, parent company of

dictional question as to whether the Commission's statutory authority covered the acquisition by PFEL of Oceanic's assets. Focusing on this question, the court of appeals concluded ". . . that it is not the Federal Maritime Commission which has the duty to approve or disapprove the type of contract made the subject of this litigation." (P.A. 49). Having so ruled, the court found it unnecessary to reach any other issue raised in the proceeding (P.A. 50).

SUMMARY OF ARGUMENT

Section 15 of the Shipping Act, 1916, requires that ocean-going common carriers file for Commission* approval, *inter alia*, "every agreement . . . controlling, regulating, preventing, or destroying competi-

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another carrier by water, Sea-Land Service, Inc. While permitting the Commission to intervene in the antitrust action, the district court refused to dismiss or stay its proceeding pending the outcome of the Commission's hearing on the acquisition, and in a written opinion held that Section 15 of the Shipping Act did not give the Commission authority over mergers and acquisitions in the shipping industry. While a petition for writ of certiorari in *R. J. Reynolds Tobacco Company, et al.* v. *United States and Federal Maritime Commission*, No. 71-157, is pending before this Court to review the district court decision involving the original Reynolds' agreement to acquire United States Lines, a revised and *different* agreement was submitted and is currently before the Commission under Section 15 for approval of Reynolds' conditional acquisition and operation of United States Lines.

*"Commission" refers to the Federal Maritime Commission [75 Stat. 840 (1961)] and its predecessors, the United States Shipping Board [39 Stat. 728, 729, 733(1916)]; the United States Shipping Board Bureau of the Department of Commerce [Exec. Order No. 6166, § 12 (1933)]; the United States Maritime Commission [49 Stat. 1985(1936)]; and the Federal Maritime Board [64 Stat. 1273 (1950)].

tion." That an acquisition of assets of one carrier by another falls within the ambit of Section 15 is amply demonstrated by a careful examination of the plain meaning of the language of the statute, the legislative history of Section 15 and subsequent legislative action, the established national policy governing maritime regulation, and the judicial and administrative construction of Section 15.

I

It must follow from the plain meaning of the language of Section 15 that an agreement for the acquisition of all the assets of one carrier by another carrier is quite literally an agreement that controls, regulates, prevents or destroys competition. Section 15 is applicable to "every agreement" and the word agreement includes "understandings, conferences, and other arrangements." This Court has cited approvingly the Commission's own view of the unambiguity of that section: " 'Section 15 describes in unambiguous language those agreements that must be filed. . . . Since the wording of Section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve.' " *Volkswagenwerk A.G.* v. *Federal Maritime Commission,* 390 U.S. 261, 274, 275 (1968).

None of the canons of statutory construction gives comfort to those who would suggest that the plain meaning of Section 15 is circumscribed or limited to those agreements which are subject to continuing supervision by that section's concluding catchall phrase "or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

An acquisition of assets agreement, although a single, discrete event, is always subject to the withdrawal of Commission approval and consequent attack by the Department of Justice under the antitrust laws.

Section 15 grants this Commission explicit power to exempt from the antitrust laws those agreements which have been duly approved. Therefore, the rule that repeals of the antitrust laws by implication are disfavored has no application to this situation.

II

Although the legislative history could have stated more affirmatively Section 15's intended coverage, it does evince a clear intention on the part of Congress to bring every described agreement between ocean-going carriers under the scrutiny of a specialized body of experts. The Congressional Committee investigating the malaise of the shipping industry in 1914 was well aware of the then prevalent means of attenuating competition by various agreements, including merger, acquisition, and consolidation.

The Committee's investigation included the distribution of questionnaires to shipping concerns seeking information, *inter alia*, on their formation and industry consolidations and acquisitions; the Committee's work and findings were synthesized into what is now known as the Alexander Report.[10] This report concluded that although in the foreign trade, competition was primarily controlled by agreements which regulated rates,

[10] H.R. Doc. 805, 63rd Cong., 2d Sess. (1914) [hereinafter Alexander Report].

arranged for pooling of revenues and allotted sailings, competition in the domestic trade was controlled in large part by consolidations.

The Report made several recommendations, among which was that all agreements be required to be filed for approval with the Interstate Commerce Commission. In adopting these recommendations, Congress required that the agreements be filed with the newly created Shipping Board; no distinction was made between the foreign and domestic trades, so that the word "agreement" as used in Section 15 was meant to cover mergers, acquisitions, and consolidations in both trades.

While it is true that "[s]ubsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant, . . . [it] is entitled to weight when it comes to the problem of construction." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958). An oft-cited piece of legislation which bears upon the construction of Section 15 is the 1950 amendment to Section 7 of the Clayton Act, in which Congress specifically exempted from the reach of that section's prohibitions, "transactions duly consummated pursuant to authority given by" various federal agencies including this Commission. It is clear that the exemption paragraph did not confer any new powers upon this agency, but the acceptance by Congress of the Commission's request for inclusion indicates a Congressional understanding of Section 15's coverage inasmuch as Section 7 of the Clayton Act deals with acquisitions of stock and assets.

A similar understanding regarding Section 15's application is reflected by Congress in considering proposed pre-merger notification legislation during the period 1956-1960, and during a Congressional Committee's investigation begun in 1962 of the Commission's regulation of the shipping industry.

III

If acquisition agreements between ocean carriers are not given some protection from the full thrust of the antitrust laws, the aims and policy of the Shipping Act may be seriously curbed or defeated. A fundamental objective of the Shipping Act, 1916, repeatedly stressed by this Court, was to create an administrative body with maritime expertise to regulate ocean shipping. *Far East Conference* v. *United States*, 342 U.S. 570, 573-576 (1952); *United States Navigation Co.* v. *Cunard S.S. Co., Ltd.*, 284 U.S. 474, 485 (1932). Unless such regulatory jurisdiction included authority over consolidations, mergers, and acquisitions by and among industry members, regulation by the expert agency would be greatly curtailed, if not completely nullified in many instances.

With respect to acquisitions and merger transactions in the shipping industry, Commission expertise must be called upon to reconcile conflicting national policies represented by the Shipping Act and the antitrust laws. To allay any fears that antitrust attention would not be given to merger and acquisition agreements filed for the Commission's approval, *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), shows clearly that antitrust principles are

to be weighed and balanced by the Commission against industry considerations in deciding the approvability of such agreements. However, the public interest in paramount industry considerations would be sacrificed were merger and acquisition transactions in the shipping industry open to attack by either the Federal Trade Commission or the Department of Justice and the legality of such transactions measured solely by competitive standards under the antitrust laws. In such cases, there would be no opportunity for the public policy objectives of the Shipping Act to prevail.

In deciding that "agreements other than those of a continuing nature" were not meant to be subject to the Commission's jurisdiction, the court below noted, but refused to follow, the mandate of this Court giving Section 15's coverage broad construction. As clearly stated by this Court in *Volkswagenwerk,* 390 U.S. 261, 273-276, Section 15 "uses expansive language" and should be construed broadly so as to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." Given these guidelines, the Ninth Circuit Court of Appeals correctly concluded in *Matson Navigation Co.* v. *Federal Maritime Commission,* 405 F.2d 796 (9th Cir. 1968) that merger agreements were plainly encompassed by Section 15.

Although the final authority as to statutory construction rests with the courts, "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts. . . ." *Volkswagenwerk,* 390 U.S. 261, 272. This agency has continuously construed Section 15 as conferring jurisdic-

tion over mergers, acquisitions, and like transactions. The docketed and reported proceedings include several merger or consolidation agreements; sales of goodwill, ships and other assets; and transfers of stock and other operating assets: *New York and Porto Rico Steamship Company Agreement,* 2 U.S.M.C. 453 (1940) (sale of goodwill and agreement not to compete for ten years); *Agreements 8745 and 8745-1,* 7 F.M.C. 199 (1962), *Agreement No. 8555,* 7 F.M.C. 125 (1962) (sale of assets and agreement not to compete); *Merger—American Mail Line and Pacific Far East Line,* 11 F.M.C. 53 (1967), reversed on other grounds, *Matson Navigation Co. v. F.M.C.,* 405 F.2d 796 (9th Cir. 1968) (merger or consolidation of three steamship lines); *Agreement No. 9810,* 13 F.M.C. 156 (1969) (transfer of stock and operating assets); *Agreement No. 9905,* 14 F.M.C. 163 (1970) (sale of all four vessels operating in a particular service); *Agreement No. 9827-1,* currently pending decision before the Commission [11] (agreement of merger between U.S. Lines, Inc. and Sea-Land Service, Inc.).

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[11] Notwithstanding the holding of the district court in *United States v. R. J. Reynolds Tobacco Corp.,* 325 F. Supp. 656 (D.N.J. 1971), that the Commission did not have jurisdiction over the merger agreement there involved, the Commission has continued its administrative hearing on this agreement.

ARGUMENT

I. JURISDICTION OVER ACQUISITION AGREEMENTS BETWEEN OCEAN CARRIERS IS FOUNDED UPON A CLEAR AND UNEQUIVOCAL EXPRESSION OF CONGRESS AUTHORIZING THE FMC TO APPROVE, DISAPPROVE, OR MODIFY AGREEMENTS CONTROLLING, REGULATING, PREVENTING, OR DESTROYING COMPETITION.

A. *An Agreement for the Acquisition of the Assets of One Carrier by Another Is, Literally, an Agreement "Controlling, Regulating, Preventing, or Destroying Competition."*

Prior to PFEL's purchase of Oceanic's assets, both of these common carriers by water operated in Pacific Ocean trades between the West Coast of the United States and South Pacific points. While Oceanic operations over Trade Route 27 to Australia-New Zealand were not directly competitive with PFEL sailings over Trade Route 29 to Guam, acquisition of the Oceanic vessels in operation and under construction eliminated potential competition between these carriers and enhanced PFEL's competitive position with respect to other trans-Pacific carriers. The acquisition agreement between these two common carriers, therefore, clearly resulted in or had the effect of "controlling, regulating, preventing or destroying competition"—language of the Shipping Act's Section 15.

In determining the purpose of a statute, this Court has stated that, "[t]here is, of course, no more persuasive evidence . . . than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Association,* 310 U.S. 534,

543 (1940). Although "acquisition, merger, or consolidation" agreements are not specifically enumerated in the language of Section 15, neither are the countless other types of agreements over which this agency has asserted jurisdiction, i.e. terminal leases, long-term charters, transshipment agreements, and joint service contracts, to name but a few. In *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261, 273, this Court held that the FMC had taken "an extremely narrow view of a statute that uses expansive language" in refusing to find subject to Section 15 an agreement among members of a maritime collective bargaining association to allocate among themselves the costs of a fund to mitigate the impact upon employees of technological unemployment, the "Mech Fund". Although "Mech Fund" agreements were not specifically enumerated in that Section, this Court found that such an agreement would have the effect of controlling, regulating, preventing, or destroying competition and held that the Commission erred in declaring that the agreement was not subject to Section 15. Just as in *Volkswagenwerk*, where "Mech Fund" coverage was not specifically spelled out, it is unnecessary for mergers, acquisitions, and consolidations to be expressly enumerated for coverage under the broad sweep of Section 15's language.

Those who would give Section 15 a more circumscribed application have argued mainly that the final category of agreements enumerated in this Section—"or in any manner providing for an exclusive, preferential, or cooperative working arrangement"—is a qualification of the preceding six categories and is meant to limit their application to only those agree-

ments of an on-going nature. Such an interpretation would render superfluous six of the seven categories of Section 15. That construction has been rejected by this Court in *Volkswagenwerk,* 390 U.S. 261, 275, n.23, as well as the Ninth Circuit Court of Appeals in *Matson Navigation Co.* v. *Federal Maritime Commission,* 405 F.2d 796, 799, n.7. Yet this was the rationale applied by the court below (P.A. 22), as well as the district court in *United States* v. *R.J. Reynolds Tobacco Co.,* 326 F.Supp. 656, 659, which held that "an agreement of merger, which is essentially a single, discrete event" was not within the ambit of Section 15. In view of its concern, as expressed in the Alexander Report and considered more fully below, with the entire spectrum of anticompetitive activity in the shipping industry, Congress can hardly be attributed, in the absence of a clear expression to the contrary, with the intent to exclude agreements that are not of a continuing nature but otherwise fall squarely within the categories described in Section 15. Moreover, it would be inconsistent with the regulatory scheme of the Shipping Act not to make this type of agreement "controlling, regulating, preventing, or destroying competition" subject to Commission scrutiny and approval or disapproval under the same standards applicable to all other agreements having the same effects, simply because this type of agreement is consummated in a "single, discrete event."

That Congress, in 1916, was aware of the effects on competition of mergers and acquisitions is evidenced by this Court's holding just four years earlier that the Sherman Act was applicable to the acquisition by one

company of a controlling stock interest in its competitor. As stated in *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 61, 86 (1912), such an acquisition was barred by the Sherman Act since it had the effect of "destroying or restricting competition" with the competitor. Thus, Congress knew that mergers, acquisitions or consolidations could control, regulate, prevent, or destroy competition and the use of such language in Section 15 can only be interpreted as being meant to encompass those transactions. Congress had also dealt with such anti-competitive arrangements in its deliberations on the Clayton Act, 38 Stat. 730, and the Federal Trade Commission Act, 38 Stat. 717, both enacted two years prior to the Shipping Act.

A different argument that has been made against Section 15's expansive coverage is that the other two transportation regulatory agencies, the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB) both have been given explicit statutory authority over acquisitions, 49 U.S.C. § 5(2) and 49 U.S.C. § 1378, respectively, while the FMC has not. But this argument gives way readily upon a careful examination of the statutory language and legislative history of the acquisition authority of these other transportation agencies.

The original Section 5 of the Interstate Commerce Act (24 Stat. 379), enacted in 1887, was confined to an outright prohibition against the pooling of revenues of competing carriers. A 1912 amendment to Section 5 (37 Stat. 566) increased ICC acquisition authority only to the extent that rail carriers were prohibited from owning or controlling water carriers over com-

peting routes. Enactment of the Shipping Act in 1916, granted considerably more authority to this Commission than was then conferred upon the ICC. In 1920, Section 5 of the Interstate Commerce Act was again amended (41 Stat. 480) to permit the ICC to approve pooling agreements and limited consolidations and to immunize approved transactions from the antitrust laws. It was not until 1940 that the Interstate Commerce Act provided for approval of consolidations, mergers, and acquisitions on a broad scale (54 Stat. 905).

The Civil Aeronautics Act was passed in 1938 (52 Stat. 973) and granted specific authority to the CAB (then the Civil Aeronautics Authority) over mergers, consolidations, and acquisitions in Section 408 [12] of the Act, as well as a general authority in Section 412 [13] over agreements "for controlling, regulating, preventing, or otherwise eliminating *destructive, oppressive, or wasteful competition . . . or for other cooperative working arrangements.*" [Emphasis added]. The CAB has construed that Act as requiring approval of merger and acquisition agreements pursuant to both the general coverage of Section 412 as well as the specific provisions of Section 408. See *Acquisition of Marquette By TWA*, 2 C.A.B. 1, 4 (1940).

The narrow prohibition against pooling in Section 5 of the ICC's organic statute, which differs from the broad coverage of Section 15 of the Shipping Act, was enlarged somewhat in 1920 and then again to a greater

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[12] 49 U.S.C. § 1378.
[13] 49 U.S.C. § 1382.

degree in 1940 in order to grant the ICC authority over mergers, acquisitions, and consolidations. Specific merger and acquisition authority given to the CAB, however, did not occur until some 22 years after the creation of the Shipping Act. Thus, with an initial granting of the broadest authority in Section 15 of the Shipping Act over anti-competitive agreements found in the maritime industry, subsequent specificity by Congress in the statutes of the ICC and the CAB cannot be said to diminish the earlier authority granted to this Commission.

The lower court has also suggested that the Commission should not be vested with such jurisdiction because of its failure to hold a hearing in this case (P.A. 48). There is a dearth of authority for the proposition that improvidently exercised jurisdiction is dispositive of the question of its existence. A hearing was not held on the basis of the same lower court's mandate in *Marine Space Enclosures* case, 420 F.2d 577, 587, and because of the protestant's failure to show real or immediate harm, but this in no way establishes why the Commission lacks or should be denied jurisdiction over the subject matter.

B. *Exemption of FMC Approved Agreements of Merger and Acquisition from the Antitrust Laws Pursuant to Section 15 Does Not Constitute an Implied Repeal of the Antitrust Laws.*

The doctrine that antitrust laws are not to be repealed, nor their exemptions expanded, by implication is well recognized; however, the cases most often cited

for that proposition involved either transactions that were without the defined area of agency action, or agency approval which, though required by statute, did not carry antitrust immunity.[14]

Positioned squarely within the parameters of Section 15 is authority for the FMC to exempt from the provisions of the antitrust laws "every agreement, modification, or cancellation lawful under this section. . . ." This explicit FMC authorization is to be compared with the statutes of governmental agencies that have relied upon an implied authority for immunizing transactions from antitrust coverage. In *Milk Producers Association* v. *United States*, 362 U.S. 458, authority was granted to the Secretary of Agriculture by Section 8(b) of the Agricultural Adjustment Act (7 U.S.C. § 608b) to approve and exempt from the antitrust laws agricultural marketing agreements. This Court held that authority granted for marketing agreements did not extend to an agreement for acquisition of the assets of a competitor. Likewise, in *California* v. *Federal Power Commission*, 369 U.S. 482, an acquisition by El Paso Natural Gas Company of the stock of the Pacific Northwest Pipeline Corporation was found not covered by the certificate of public convenience and necessity provision of Section 7 of the Natural Gas Act (15 U.S.C. § 717f), since that section conferred jurisdiction on the Federal Power Commission (FPC)

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[14] *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *Milk Producers Association* v. *United States*, 362 U.S. 458 (1960); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

over the acquisition of assets but not over stock acquisitions. In addition to the fact that the stock acquisition agreement fell outside the scope of FPC authority, Commission approval of the subsequent asset acquisition agreement was held not to confer antitrust immunity upon that transaction. This Court stated that, "[W]hile 'antitrust considerations' are relevant to the issue of public interest, convenience, and necessity' . . . there is no 'pervasive regulatory scheme' . . . including the antitrust laws that has been entrusted to the [Federal Power] Commission. . . ." 369 U.S. at 485. The language of the Natural Gas Act was compared with the statutory language of the Interstate Commerce Act, which patently exempted approved mergers and acquisitions from the antitrust laws, 49 U.S. § 5(11).

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, a merger of two banks approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1960 (12 U.S.C. § 1828c) was attacked by the Department of Justice. It was argued that the Bank Merger Act, by directing the involved banking agencies to consider competitive factors before approving mergers, immunizes approved mergers from challenge under the antitrust laws. In response to that argument, this Court pointed out that,

> No express immunity is conferred by the Act."[27]
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> * * * *

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27. Contrast this with the express exemption provision of, e.g., the Shipping Act, 46 U.S.C. (1958 Ed. Supp. III) § 814. . . . 374 U.S. at 350.

The specific statutory authority given to the Commission to exempt Section 15 transactions from antitrust coverage, therefore, is clearly distinguishable from the implied or derivative authority which the Secretary of Agriculture, Federal Power Commission and Comptroller of the Currency attempted to assert in order to grant antitrust immunity.

While an agreement of merger, acquisition, and consolidation has been characterized in the *Reynolds Tobacco Co.* case, 325 F.Supp. 656, 659 as "a single, discrete event", this is not to suggest that the FMC would lack jurisdiction over such agreements because it could not exercise continuing supervision over them and fashion divestiture or other equitable relief. This agency would be confronted with no more difficult impediment than that faced by the Federal Trade Commission in ordering, or the courts in decreeing, divestiture relief for antitrust violations." Likewise, this Commission believes it has the power to devise appropriate relief; were the resulting entity of a merger or acquisition transaction to engage in activities violative of the Shipping Act or the antitrust laws, the Commission could disapprove the underlying agreement, thereby laying the transaction open to attack under the antitrust laws.

This Court has recognized that administrative agencies have the power to fashion appropriate relief. That power has been analogized "to the power of courts to fashion Sherman Act decrees. . . . Likewise, the power

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" Cf. *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966).

to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority. . . ." *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312, n.17 (1963).

In light of the plain language of Section 15 and with no clearly expressed Congressional intent to the contrary, the Commission cannot do other than subject to its scrutiny merger or acquisition agreements, the effects of which may control, regulate, prevent or destroy competition in our nation's maritime commerce.

II. THE LEGISLATIVE HISTORY OF SECTION 15 NOWHERE ESTABLISHES OR SPECIFIES ANOTHER OR CONTRARY INTERPRETATION OF THE PLAIN IMPORT OF THE LANGUAGE OF THAT SECTION.

A. *Congress Was Fully Cognisant of Acquisitions, Mergers and Consolidations in the Shipping Industry and Provided for Their Coverage by Enacting the Shipping Act.*

The Congressional action that finally culminated in the publication of the Alexander Report began in earnest with the introduction in 1912 of House Resolution 425 [10] directing that,

> [t]he Committee on the Merchant Marine & Fisheries be, and is hereby, empowered and directed to make a complete and thorough investigation of the methods and practices of the various steamship lines, both domestic and foreign, engaged in carry-

[10] H.R. Res. 425, 62d Cong., 2d Sess. (1912). Alexander Report at 8.

ing our over-sea or foreign commerce and in the coastwise trade . . . ; and to investigate whether such ship lines have formed any agreements, conferences, pools, or other combinations among each other . . . for the purpose of preventing or destroying competition; . . . and said committee . . . shall further investigate what effect such combinations, agreements, and practices of . . . over-sea shipping lines, whether domestic or foreign, if any are found to exist, have on the commerce and freight rates of the United States. . . .

House Resolution 425 was subsequently broadened in order to expand the scope of the investigation to include ownership of ship lines by other ship lines as well as by railroads. House Resolution 587 [11] provided that the Committee on the Merchant Marine and Fisheries shall investigate whether the "ship lines, both domestic and foreign, engaged in carrying our over-sea or foreign commerce and in the coastwise and inland commerce . . . have formed any agreements, understandings, working arrangements, conferences, pools, or other combinations among one another . . . for the purpose of . . . preventing or destroying competition."

Pursuant to House Resolution 587, a schedule of inquiries was submitted by the Committee to domestic water carriers. These carriers were queried, *inter alia*, as to their formation, whether by consolidation, merger, or other manner:

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[11] H.R. Res. 587, 62d Cong., 2d Sess. (1912). Alexander Report at 2.

5. If your corporation, firm, or line, at the time of its organization, represented a consolidation or merger of any companies, firms, or individual carriers, give the names and addresses of all the companies, firms, and individual carriers thus consolidated or merged.

6. Give the names and addresses of all corporations, firms, or individual carriers which your company, firm, or line has acquired, either by purchase, lease, or otherwise, since its organization.

7. Give the names of all corporations, any portion of whose common or preferred stock, or bonds, short-term notes or other securities, has been acquired by purchase, by exchange, or otherwise, by your company, firm, or line.

* * *

14. Give the names and addresses of all corporations and firms owning stocks or bonds or other securities in your company.

* * *

16. If your company, firm, or line is the owner of any stocks or bonds or other securities in any . . . navigation company or companies, or any other common carriers . . . give the names and addresses of all such companies . . .

Instructions for answering question 17. Under the heading 'Control, how established,' should be entered the form of control exercised, i.e., whether through title to voting securities; any agreement, other than through title to securities, to name

majority of directors . . . *Also specify all those controlled corporations, firms, or lines which are inactive.* [Emphasis in original].

17. If your company, firm, or line controls, either directly or through any other company or firm, any . . . navigation companies, firms, or lines, or any other common carriers . . . by ownership, by lease, by mortgage, or otherwise, give the names and addresses of all the companies and firms thus controlled.

The findings of the Committee were thoroughly documented in a four volume work entitled *Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations Under H.Res. 587,* of which the Alexander Report,[11] constituting the summary of those findings, is Volume IV. Throughout the first three volumes of the *Proceedings* there are numerous references to control of competition in the United States foreign and domestic trades not only through conferences, pooling, rebates, and working arrangements, but through merger, consolidation, and acquisition. The following table identifies and contains references to portions of the *Proceedings* dealing with the Committee's concern over mergers, acquisitions and consolidations in the shipping industry.

Reference	Volume	Page
Acquisition of Prince Line and Lamport & Holt Lines by Royal Mail Line.[12]	I	17

[11] Named after the Chairman of the Committee on the Merchant Marine Fisheries, Joshua W. Alexander.

[12] The resulting entity was referred to by a witness as a "combination". Later, various witnesses repeatedly mentioned the merger

Reference	Volume	Page
Acquisition of Atlas Line by Hamburg—American Line.[20]	I	319
Acquisition of Union Steamship Company by the Indra and Hamburg—American Lines.[21]	I	326
International Mercantile Marine Company acquired International Steam Navigation Company and its subsidiary lines and the Oceanic Steamship Co.[22]	I	345
Hamburg—American acquired the assets of the Eagle Line.[23]	I	351
W.R. Grace & Co. owned the New York & Pacific Steamship Company and the Merchants' Line.	I	465
North German Lloyd, the Hamburg—American Line and the International Mercantile Marine Co. owned 51 percent of the stock of Holland—American Line.	I	568
Atlantic, Gulf and West Indies Steamship Co. owned the New York & Porto Rico Steamship Co., the Mallory Line, the Clyde Line, and the New York & Cuba Mail Line.	I	643, 644

in connection with the monopolization of the South-American trade, the resultant elimination of competition, and the inevitable rise in the freight rate on coffee. See Volume I at 50, 90-93, 128, 215, 239.

[20] Atlas Line was the only carrier in the New York/Haiti trade.

[21] The Indra and Hamburg-American Lines later became known as the United States and China-Japan Steamship Line in the United States Atlantic/East Asia trade.

[22] In addition, the company owned or controlled the Atlantic Transport Line, the National Steamship Co., the Dominion Line, and the Leland Line, as well as a 25 percent interest in the Holland-American Line. Vol. I at 574. The International Mercantile Marine Company was notorious for its acquisition of steamship lines. It was said to have been created as a result of J.P. Morgan's efforts to form a combination of shipping lines. Vol. I at 837.

[23] The "Union Line was practically, under an agreement, acquired later by the Hamburg-American Line." Vol. I at 351.

Reference	Volume	Page
United Fruit Co. was formed by acquiring several companies engaged in the production, transportation, distribution, and sale of bananas.	I	720
Consolidations involving Hamburg—American and North German Lloyd, Hamburg—American and Scandinavian—American Line, and Holland—American.	II	758, 759
Purchase of a line of vessels by Royal Mail Line.[24]	II	813

Volume III of the *Proceedings*, entitled *Special Diplomatic And Consular Reports*, consisted of answers filed by diplomatic and consular officers of the United States in foreign countries, in response to interrogatories submitted by the Department of State dealing with methods and practices of steamship lines engaged in the foreign trade of the United States.

The report of the American Consul at Liverpool contained a detailed discussion of the holdings of the International Mercantile Marine Company, "commonly known as the 'Shipping Trust.'" Vol. III at 139. In discussing the formation of the trust, the Consul stated that "an agreement was concluded between Mr. J. Pierpont Morgan . . . for the purchase of the Oceanic [Steam Navigation Co.]." *Id.* at 140.

The Consul General at Rio de Janeiro mentioned the acquisition of Lamport & Holt and the Prince Line by The Royal Mail Steam Packet Co. *Id.* at 219.

[24] This purchase was viewed as foreshadowing a war between Royal Mail and Hamburg-American.

Volume IV of the *Proceedings*, the Alexander Report, consists of a summary of the findings made in the preceding three volumes and a series of recommendations for legislative consideration in connection with House Resolution 587.

At pages 336-346 of the Alexander Report, a discussion treats consolidations among carriers on the Great Lakes. The attention is focused on an extremely detailed chart depicting the intercorporate and other relations existing between some 37 groups of carriers comprising 105 companies, firms, or managements, operating 453 vessels. Chapter 14 of the Report, "Extent and Methods of Control of Competition between Water Carriers in the Domestic Trade," summarizes the findings thusly:

> The foregoing chapters discuss the control of regular line service in the most important divisions of this country's domestic commerce. . . . It was shown that the line traffic is handled by comparatively few companies and that these are largely controlled by railroads and shipping consolidations. Alexander Report at 403.

With respect to the foreign trade, the Report treats mergers, consolidations, and acquisitions extant in that trade as follows—

> [T]here are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries. (The most notable examples of such consolidations are the International Mercantile Marine Co., the Royal

Mail Steam Packet Co., the Hamburg—American Lines, and Furness, Withy & Co.) *Id.* at 301.

but concluded that,

> it is the almost universal practice for steamship lines engaging in the American foreign trade to operate . . . under the terms of written agreements, conference arrangements or gentlemen's understandings which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. *Id.* at 415.

When the Report reached its recommendations with respect to the foreign trade, however, it did not limit its suggestion to only those agreements enumerated above, but recommended that *all* agreements be subject to the scrutiny of a public agency.

> The consensus of opinion . . . is overwhelmingly in favor of some form of government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives, who appeared before the Committee, expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of full publicity and approval of *all agreements or arrangements which*

steamship lines may have entered into with other steamship lines. . . . [Emphasis supplied] *Id.* at 307, 308.

More specifically, the Committee recommended,

> [r]elative to such supervisory control by the government of steamship carriers in the foreign trade of the U.S., the Committee offers the following recommendations: (1) That navigation companies, firms, or lines engaged in the foreign trade of the United States be brought under the supervision of the Interstate Commerce Commission as regards the regulation of rates, the approval of contracts entered into with other water carriers . . . and such other conditions of water transportation as affects the interests of shippers. (2) That *all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements . . . entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade. . . .* [Emphasis supplied] *Id.* at 419, 420.

With respect to carriers in the domestic trade, the Committee's recommendations were similar to those for the foreign trade even though it was concluded that,

> Unlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few. Competition in rates between

domestic water lines, however, has been quite as effectively eliminated as in the foreign trade and this has been accomplished by the several lines through one or more of the numerous methods discussed in Part II [including, *inter alia*, consolidations among carriers]. *Id.* at 421, 422.

The recommendations for domestic carriers provided, *inter alia*,

> That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements affecting interstate transportation . . . with other water carriers . . . *Id.* at 422.

B. *In Enacting Section 15, Congress Followed the Recommendations of the Alexander Report and Intended to Subject to Commission Scrutiny All Those Agreements with Which the Alexander Committee Expressed Concern.*

As this Court has stated in the *Volkswagenwerk* case, 390 U.S. 261, 276:

> Nothing in the legislative history suggests that Congress, in enacting Section 15 of the Act, meant to do less than follow this recommendation of the Alexander Report [that all "agreements" be filed] and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.

Section 15 of the Shipping Act developed from two

bills, H.R. 14337, and H.R. 15455." The forerunner of Section 15's provisions appeared in H.R. 14337 under Section 3, and required the filing of "every agreement, understanding, conference, or arrangement," and in H.R. 15455 in Section 16, which used only the word "agreement," and defined "the term 'agreement' in this section . . . [as including] understandings, conferences, and other arrangements," which is retained in Section 15's present language. The word "agreement" was clearly intended to have the broadest connotation possible, and was not meant, as characterized in the *Reynolds Tobacco Co.* case, 325 F.Supp. 656, 659, to be "a term of art, a word of technical legal significance." This is apparent from the constant use by both the Committee and Congress of the word "agreement" in describing every arrangement entered into by carriers, including those of acquisition, merger, or consolidation.

Neither one of the two bills made any distinction between agreements in the domestic trade and those in the foreign trade, nor can any discussion be found referring to such a distinction in any of the hearings or committee reports. Congress could readily have provided for the filing of certain agreements in the foreign trade and other types in the domestic trade if such a distinction had been intended. The bill as enacted into law incorporates in toto the recommendations of the Committee with the exception that agreements were to be filed with the United States Shipping Board (an

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[*] 64th Cong., 1st Sess. (1916).

administrative agency created by the Shipping Act) and not the Interstate Commerce Commission.

In the debates, hearings, and committee reports on H.R. 15455, there is ample evidence from which to glean the intent of Congress to subject agreements of merger, acquisition, or consolidation to the scrutiny of a specialized agency. While a principal concern of the Committee, and subsequently the Congress, in dealing with foreign trade, was the conference system, the ultimate purpose of the proposed legislation was to permit anticompetitive agreements in preference to chaotic free competition, as long as those agreements were subjected to government scrutiny and approval.

During the hearings [*] before the Senate Subcommittee a colloquy between Chairman Furnifold McL. Simmons and Arnon L. Squires, attorney, indicates that the Chairman understood the bill to require every conceivable agreement be filed.

> Mr. Squires: In other words, it would never do for any operator to take a chance with that law with that clause in there, with the accepting clause just preceding it, which says, "all other agreements." That means every kind of agreement you can think of. I can not interpret that language any differently.
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> The Chairman: If you are talking about agreements between carriers that is absolutely true . . . . Hearings at 165.

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[*] Hearing Before the Subcommittee of the Committee on Commerce United States Senate on H.R. 15455, 64th Cong., 1st Sess. (1916).

In the hearings on H.R. 14337," Dr. Emory R. Johnson, Professor of Transportation and Commerce, University of Pennsylvania, stated that,

> [t]he bill under consideration by the Committee proposes to substitute Government regulation in the place of unregulated competition and uncontrolled monopoly in the ocean transportation business, the main purposes of the proposed regulation being to insure fair methods of competition, to put a limit upon private monopoly. . . . The bill seeks to extend to the ocean transportation business the standards of fair competition that the act to create a Federal Trade Commission requires of those engaged in commerce. The measure aims to correct the evil results of unregulated competition. . . . Hearings at 11.

Referring specifically to Section 3 of the bill (Section 15), Professor Johnson stated,

> [t]he language is very broad. It gives the board the power to determine what is and what is not in accordance with the public weal in those agreements. It is a very broad power and wisely so, because those agreements, when approved, are by the following language of the act taken out from under the antitrust law. *Id.* at 40.

Later, during those same hearings, Representative Hardy, addressing a witness, George S. Dearborn,

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" Hearings Before the Committee on the Merchant Marine and Fisheries on H.R. 14337, 64th Cong., 1st Sess. (1916).

President, American Hawaiian Steamship Co., stated,

> . . . your ship lines on the ocean in the international and coastwise trade have formed an infinite number of combinations, and they have the power of destroying competition without any restraining power of the Government unless we pass some bill like this. . . . [I]t has been demonstrated through two years of hearings before this committee that on the Lakes, in the coastwise, overseas, and everywhere your regular lines are in vast combinations from the Mediterranean to New York and everywhere. . . . Competition has practically died out. . . . And then, that being the case, are you going to have combination without any restraint at all? *Id.* at 107.

Finally, during the debate on the final bill (H.R. 15455), Representative Alexander stated the issue succintly,

> [w]e investigated every trade area in the world. We developed all the conditions under which the regular lines of vessels in over-sea trade, as well as our coastwise trade, were operating. . . . You will find how close and intimate were the relations between all the regular lines in the coastwise trade and on the Great Lakes and in the overseas trade as disclosed by our investigation. As a result of our investigation we were confronted with the question whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should

be enforced against them and these combinations broken up. . . ."[28]

The course settled upon by Congress was to enact a law recognizing and permitting such agreements between carriers under regulatory control rather than subjecting them to the stringent competitive standards of the Sherman and Clayton Acts.

The Alexander Committee considered consolidation which created a monopoly to be less desirable than the monopoly created by the conference system of rate fixing, apportionment of traffic, and the pooling of earnings.[29] This is shown by the statement in the Alexander Report that if the then prevalent carrier agreements covering rates and other aspects of competition were required to be terminated (as violations of the Sherman Act), there would be "one of two results": rate wars which would mean the elimination of the weak, or, "to avoid a costly struggle, the lines would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." Alexander Report at 416. The language ultimately adopted by Congress in Section 15, discussed *supra*, made no distinction between consolidation agreements and other agreements such as those creating and implementing conference systems. Moreover, this statement of the Committee does not evince an intent on the part of Congress to

[28] 53 Cong. Rec. 9077, 64th Cong., 1st Sess. (1916).

[29] That is not to say that all consolidations were feared or frowned upon by the Committee (see Alexander Report at 406).

forestall or prevent all mergers and acquisitions among shipping companies. Clearly, Congress was not of the belief that it was impossible to prevent all mergers by legislation" and thus withheld from the Commission authority to pass on mergers in the shipping industry.

The legislative history of Section 15 leaves no question as to whether Congress was fully cognizant of the problems of merger, acquisition, and consolidation in the shipping industry, and its intention to subject agreements providing for those transactions, along with all other anticompetitive agreements, to the scrutiny of a specialized body of experts is plainly apparent. Since this Congressional intent appears throughout every step of the legislative process creating this law, it is hard to follow the lower court's view that Congress "had neither sought information nor had discussion on ship sale agreements. They were neither a part of the problem nor part of the solution." (P.A. 32). With the Alexander Committee's in-depth investigation of and apparent concern over industry mergers and acquisitions, it is unlikely that Congress would have overlooked or neglected to exclude from regulation acquisitions, mergers, and consolidations without so indicating in either the hearings, committee reports, debates, or by express limitation in the Shipping Act.

" In 1914, the year the Alexander Report was submitted to Congress, the Sherman Act had already been in effect for twenty-five years, and had been applied to prevent the consolidation of competitors through common ownership where monopoly or the destruction of competition resulted. (See *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 61 (1912), *supra* at 16). And one of the main purposes of the Clayton Act, enacted in 1914, was the control of corporate acquisitions and unifications.

C. *Post Enactment Consideration of Section 15 by Congress Fully Supports the Shipping Act's Original Intent to Subject Acquisition Agreements to the Commission's Jurisdiction.*

Since the passage of the Shipping Act in 1916, Congress has on a number of occasions considered the scope and application of Section 15 in connection with other legislation. In no instance, however, has there been a subsequent Congressional action or expression that was inconsistent with the Commission's interpretation of Section 15's merger and acquisition coverage. This Court has held that "[s]ubsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In 1950, Congress amended Section 7 of the Clayton Act to include asset as well as stock acquisitions, and exempted from that section's coverage "transactions duly consummated pursuant to authority given by" various federal agencies, among which was the FMC's predecessor, the United States Maritime Commission (64 Stat. 1125). This Section 7 amendment, as originally proposed in H.R. 2734 and as passed by the House, did not include the Maritime Commission among the agencies enumerated in the exemption paragraph. This omission was first called to the Senate Subcommittee's attention by an American shipping association,[22] and then by the Commission, which re-

[22] Hearings on H.R. 2734 Before Subcommittee No. 3 of the Sen-

quested inclusion under Section 7's exemption." The Senate Subcommittee found the Commission's request to be "justified" and amended the bill accordingly." The bill was subsequently enacted with this Senate amendment.

Since Section 7 of the Clayton Act is concerned with acquisitions of stock or assets and not other forms of anticompetitive agreements or arrangements, Congress apparently felt that Section 15 of the Shipping Act was applicable to merger, consolidation, and acquisition agreements. Although it was the view of the Senate Judiciary Committee that the exemption provision gave the Commission no new powers," the inclusion of the Commission in the exemption provision would have been meaningless if the Commission had no authority to "duly consummate" those types of transactions.

Beginning with the 84th Congress in 1956 and in each Congress thereafter until 1962, a number of bills were introduced to require prior notification to the Government of mergers between corporations subject to the Clayton Act." The position of the Commission and maritime industry members during Congressional hearings on this proposed notification legislation was

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ate Committee on the Judiciary, 81st Cong., 2d Sess., at 149-153 (1950).

" Letter from the Commission's Vice-Chairman Grenville Mellen to Chairman of the Subcommittee, Senator Herbert R. O'Conor, September 29, 1949 (National Archives, accompanying papers file, H.R. 2734), appended hereto as Exhibit A.

" S.Rep. No. 1775, 81st Cong., 2d Sess. (1950).

" *Id.*

" E.g., S. 198, H.R. 7698, H.R. 12611, 85th Cong.; S.11, H.R. 10[illegible], 86th Cong.; S. 1802, H.R. 2882, 87th Cong.

that "merger agreements approved by the [Maritime] board under § 15 of the Shipping Act, 1916, as amended, and the resulting mergers are exempt from Section 7."[36]

In 1962, the Antitrust Subcommittee of the House Committee on the Judiciary held hearings to review the Commission's regulation of the shipping industry. The Committee Report (Celler Report) that followed these hearings made reference to the merger between Isbrandtsen Steamship Co. and American Export Lines, the subject of a docketed Commission proceeding in 7 F.M.C. 125 (1962), and reported the transaction as "an agreement recently approved by the Maritime Commission."[37] The Report states that the word "agreement" in Section 15 "is defined broadly so as to encompass 'all understandings, conferences, and other arrangements.'"[38] With respect to this particular committee of Congress, a committee primarily concerned with antitrust matters, there was concurrence with the Commission regarding its Section 15 authority to approve and exempt from antitrust strictures mergers and acquisitions in the shipping industry.

Although subsequent expressions and acts by Congress concededly cannot vest an agency with jurisdiction it plainly lacks, such expressions are an aid in

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[36] Hearings on Legislation Affecting Corporative Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong., 2d Sess. (1956) at 527.

[37] Antitrust Subcommittee of the Committee on the Judiciary, Report on the Ocean Freight Industry, 87th Cong., 2d Sess. at 47. [Celler Report].

[38] *Id.* at 331.

determining the intent of the Congress which enacted the original legislation. In the case at bar such expressions also serve to demonstrate a continuing awareness by Congress of how the Shipping Act was being interpreted and applied by the Commission. Any Congressional disagreement with this agency's interpretation would have been acknowledged or corrected by appropriate legislative action.

III. ACQUISITION AGREEMENTS SHOULD BE SCRUTINIZED, AS CONGRESS INTENDED, BY A TRIBUNAL KNOWLEDGEABLE IN THE PROCEDURES OF BALANCING ANTITRUST CONSIDERATIONS WITH SHIPPING INDUSTRY FACTORS.

A. *The Shipping Act's Design for Effective and Uniform Regulation of the Maritime Industry Does Not Permit the Division of Such Regulatory Authority between Different Government Agencies.*

The Commission is denied one of its most important regulatory tools if authority is not provided by the Shipping Act to approve and immunize merger and other acquisition transactions from antitrust exposure. Confusion in the industry is likely to occur because of the double legal standards that will be applicable to maritime transactions. For the simplest of acquisition transactions between carriers, a space charter or single ship sale for example, the test of legality would be based entirely on the narrow competitive standards of the Clayton Act's Section 7. Conversely, combinations of major ocean carriers engaged in either pooling, price fixing or territorial allocations would be legally adjudged by Shipping Act criteria of which antitrust principles are only one consideration.

A principal purpose of the Shipping Act repeatedly stressed by this Court, was to create an administrative body with maritime expertise to regulate ocean shipping. *Far East Conference* v. *United States*, 342 U.S. 570, 573-76; *United States Navigation Co.* v. *Cunard S. S. Ltd.*, 284 U.S. 474, 485. Unless such regulatory jurisdiction also applied to consolidations, mergers and acquisitions by and among industry members, regulation by the expert agency would be greatly curtailed, if not completely nullified, in many cases. Such an instance could occur if, in the merger of carriers resulting in a needed, single service to a foreign port, Commission approval on public interest grounds under the Shipping Act could be set aside by the improvident application of the Clayton Act's restrictions prohibiting acquisitions that "substantially . . . lessen competition or tend to create a monopoly." Judge Merrill treats this problem in *Matson Navigation Co.* v. *Federal Maritime Commission*:

> The direct and destructive impact upon competition which may result from a merger [in the shipping industry] renders it the kind of arrangement as to which expert scrutiny most clearly is to be desired. On the other hand, to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements. 405 F.2d 796, 800.

In dealing with acquisition and merger transactions occurring in the shipping industry, therefore, Commission expertise must be called upon to reconcile the conflicting national policies represented by the Shipping Act and the antitrust laws.

The statutory standards to be applied by the Commission in approving or disapproving an acquisition agreement under Section 15 are specific: whether the transaction would be contrary to the public interest, detrimental to commerce of the United States, unjustly discriminatory or unfair, or violative of the Shipping Act. Since the Section 15 agreement may also interfere with antitrust policies, the Commission must additionally consider, before granting its approval, whether the practices covered by the agreement are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244. The Commission's application of such antitrust principles to a Section 15 agreement was held in the *Svenska* case to be "in full accord with the kind of accomodation between antitrust and regulatory objectives approved by this Court.... Indeed we have stressed that such an accomodation does not authorize the agency in question to ignore the antitrust laws." *Id.* at 245, n.4.

The public interest in paramount industry considerations, however, would be sacrificed if merger and acquisition transactions in the shipping industry were open to attack by either the Federal Trade Commission

or the Department of Justice, and the legality of such transactions measured solely by competitive standards under the antitrust laws. Yet this approach is adopted by the court below in its suggestion that the "Maritime Commission should be free to intervene on behalf of the 'industry viewpoint'" in antitrust proceedings brought by the Federal Trade Commission or the Justice Department. (P.A.48). These latter agencies, however, could not depart from competitive standards in the prosecution of shipping industry mergers and acquisitions, and therefore little attention or relevance would be given to such other industry or Shipping Act considerations. With mergers and acquisitions being thus controlled by antitrust principles, there would be no opportunity for the public policy objectives of the Shipping Act to prevail.

The court below also suggested that the Commission can be ousted from jurisdiction and the aims and objectives of the Shipping Act frustrated by the simple expedient of omitting "on-going" or "continuing" arrangements in drafting agreements of sale or merger in the shipping industry. In recognizing its tenuous position the court explains:

> We recognize that there is a certain apparent inconsistency (more apparent than real) in holding that the parties are not required to file with the Commission and the Commission is not required to approve or disapprove a simple contract for the sale of ships and all assets, and yet a similar contract coupled with an agreement not to compete, which may involve more complicated anti-

trust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including anti-trust issues. (P.A. 43)

Thus, if instead of an outright purchase of Oceanic's vessels in the case at bar, PFEL had entered into a long term charter (10-15 years),[*] or coupled the acquisition agreement with a covenant not to compete, the agreement, according to the court below, would have been subject to the Commission's Section 15 jurisdiction. Such an "on-going" arrangement would have little or no different effects under the shipping and antitrust statutes. Therefore, by altering the actual mechanics of an acquisition or merger, the form rather than the substance of the transaction would control the ultimate disposition of any administrative or judicial preceding. Such a result is both unsound and undesirable.

B. *Judicial Construction of FMC Section 15 Authority Accords with the Commission's Interpretation of That Section.*

The Ninth Circuit Court of Appeals, following the *Volkswagenwerk* mandate of this Court, "that the myriad of restrictive agreements in the maritime industry" be subject to Commission scrutiny, held that the Commission had jurisdiction over an agreement to

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[*] An on-going, long term charter agreement was initially before the Commission in the *R. J. Reynolds* case, Docket No. 69-57. The agreement was later restructured into a merger and it was this latter agreement that was the subject of the *Reynolds Tobacco Co.* case, 335 F. Supp. 656. See n.8, *supra*.

merge or consolidate three steamship companies in *Matson Navigation Co.*, v. *Federal Maritime Commission*, 405 F.2d 796 (9th Cir., 1968)." The court below was not in accord with this holding, however, and relied in large part on the decision in *United States* v. *R.J. Reynolds Tobacco Co.*, 325 F. Supp. 656, holding that the Commission was without the requisite authority to pass upon the merger agreement there involved.

The *Reynolds* decision turns mainly on the fact that a merger "is essentially a single, discrete event" and therefore is not subject to the continuing supervision which the court thought was intended for all Section 15 agreements. 325 F. Supp. 656, 659. That argument, however, was considered by the Ninth Circuit in *Matson* and emphatically rejected as being contrary to the mandate of this court in *Volkswagenwerk:*

> The section lists seven categories of agreements, the seventh being agreements "in any manner providing for an exclusive preferential or co-operative working arrangement." Matson reasons that this is a catchall and that it must mean that the preceding six categories are also forms of "working arrangements." A merger, it is argued, would be an anomaly. Once accomplished, nothing remains for supervision. No power of divestiture is conferred upon the Commission. The Supreme Court in

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" See discussion on *Agreement For Consolidation Or Merger Between American Mail Line Ltd., American President Lines Ltd, And Pacific Far East Line, Inc.*, 11 F.M.C. 53 (1967), rev'd on other grounds *Matson Navigation Co.*, v. *F.M.C.*, 405 F.2d 796, *infra*, p. 49.

Volkswagenwerk v. *FMC* . . . rejected reasoning of this sort as a basis for narrowly construing the broad language of the Act. 390 U.S. at 273-275 & n.23. *Matson Navigation Co.* v. *FMC*, 405 F.2d 796, 799, n.7.

The court below took a restrictive view of the *Volkswagenwerk* guidelines, as did Judge Garth in the *Reynolds* case. The misapplication of those guidelines should be rejected as inconsistent with this Court's interpretation of the requirements of Section 15.

This Commission has maintained a continuing surveillance over industry mergers, acquisitions, and consolidations, and has consistently required agreements for such transactions to be filed for Commission approval or disapproval pursuant to Section 15. The first documented case before the Commission involving an agreement of acquisition or merger was *New York and Porto Rico Steamship Company Agreement*, 2 U.S.M.C. 453 (1940). The agreement provided for the sale of good will and a concomitant agreement not to compete for ten years. The Commission held that the agreement "is one which controls, regulates, prevents, and destroys competition . . . [and] is subject to our jurisdiction under Section 15 . . . ." 2 U.S.M.C. 453, 457.

Agreements 8745 and 8745-1, Purchase of Vessels "Alicia" and "Dorothy", 7 F.M.C. 199 (1962), involved in actuality one agreement for the sale of two vessels by one carrier to another coupled with a one year non-compete clause on the part of the seller. Prior to the hearing on the pending agreement, the Commission

invited the views and comments of the Department of Justice. In response, the head of the Antitrust Division advised the Commission that there was no objection to Commission approval of the agreement. The agreement was found to be one "which regulates, prevents and destroys competition [and] is required by section 15 of the Act to be filed immediately with the Commission, as it was." 7 F.M.C. 199, 200. The agreement was approved by the Commission.

Agreement No. 8555 Between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc., 7 F.M.C. 125 (1962), was an agreement effecting the transfer of all the assets of one carrier to another, the transferor agreeing not to compete. The Commission held that the agreement was subject to Section 15 and added:

> We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement . . . controlling, regulating, preventing, or destroying competition." To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*. We are not authorized anywise, with respect to particular types of agreements (or anything else), to emasculate the Act to the detriment of the public interest, and this (al-

> though it might make our task substantially easier) we will not do. [Emphasis in original] 7 F.M.C. 125, 128, n.5.

Opponents of Commission jurisdiction advanced the argument that steamship lines are not required to file such agreements with the Commission, which the Commission stated would keep

> this regulatory agency in the dark about such situations, even if they are wholly repugnant to the Shipping Act and the public interest. We hold, to the contrary, that such agreements must be filed with the Commission, and the Commission fully informed. 7 F.M.C. 125, 131.

An important case in the annals of the Commission's rulings on Section 15 agreements was *Agreement for Consolidations or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 F.M.C. 53 (1967), reversed on other grounds *Matson Navigation Co.* v. *F.M.C.*, 405 F.2d 796, in which the Commission met the argument that it had jurisdiction only over agreements that could be continually supervised and since a merger agreement was not amenable to continuing supervision, it was not subject to the Commission's jurisdiction. The Commission answered that "section 15 provides for continuing supervision where it is called for—but we do not concede that the provision for continuing supervision of agreements requiring it limits our authority to only those agreements." 11 F.M.C. 53, 60-61.

The court below distinguishes this last agreement on

the fact that it was an agreement to merge or consolidate and not an agreement for the acquisition of assets. "The Commission's finding in *Matson* [sic] that it had jurisdiction under Section 15, then, is not determinative of the issue in the case here, even assuming that the FMC correctly determined its jurisdiction. . . ." (P.A. 40, n.39) Curiously, however, the court later concludes that this Commission lacks jurisdiction not only with respect to acquisition agreements but " 'mergers' . . . and like ilk. . . ." as well. (P.A. 47)

Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc., and W.R. Grace & Co., and Sale and Transfer of Prudential Assets and Obligations to Grace Line, Inc., 13 F.M.C. 156 (1969) was an agreement providing for the purchase by Prudential Lines, Inc. of all the outstanding capital stock of Grace Lines, Inc. and the sale of Prudential's operating assets to Grace Line. The Commission's jurisdiction was undisputed and the agreement was approved.

Agreement No. 9905, 14 F.M.C. 163 (1970), providing for the purchase of four vessels by American Export Isbrandtsen Lines, Inc. from Moore-McCormick Lines, Inc., was submitted to the Commission pursuant to Section 15 and was subsequently approved.

Finally, the most recent agreement of merger or acquisition before the Commission is the subject of *Agreement of Merger, No. 9827-1*, currently pending decision. It was this agreement, in a different form, which was held to be outside the Commission's scope of jurisdiction in the *R. J. Reynolds Tobacco Co.* case. See n.8 *supra*. at 5.

In addition to the foregoing docketed proceedings,

there are numerous agreements of acquisition, merger, or consolidation on file with the Commission for which no formal proceedings were necessary.

The Federal Maritime Commission has endeavored to carry out the mandates of both Congress and this Court which require that Section 15 be given broad coverage. Such a construction demands that agreements of merger, acquisition, and consolidation be submitted to this Commission for approval or disapproval pursuant to Section 15.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below be reversed.

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JANUARY 26, 1973

I authorize the filing of the foregoing Brief.

ERWIN N. GRISWOLD
Solicitor General

EXHIBIT A

UNITED STATES MARITIME COMMISSION
WASHINGTON 25, D. C.

Sep 29 1949

The Honorable
Herbert R. O'Conor
Chairman, Subcommittee to
Consider H. R. 2734
United States Senate

My dear Senator O'Conor:

The attention of the Maritime Commission has been called to the provisions of the bill H. R. 2734, now under consideration by your subcommittee. Among other things, this bill would amend section 7 of the Act of October 15, 1914 (the Clayton Act), to prohibit certain corporations from acquiring the assets of competing corporations where in any section of the country the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly. The bill would also add a new paragraph to section 7 to provide that nothing contained in such section shall apply to transactions duly consummated pursuant to authority given by certain specified Federal commissions and agencies under any statutory provision vesting such power in such commission or agency.

Section 15 of the Shipping Act, 1916, as amended, which is administered by the Maritime Commission, requires every common carrier by water or other per-

son subject to the Act to file with the Commission any agreement with another such carrier or other person subject to the Act if such agreement, among other things, is one "controlling, regulating, preventing or destroying competition." The Commission has authority to disapprove any such agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act." Agreements approved by the Commission under this provision are "excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 to 79, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the government, and for other purposes', and amendments and Acts supplementary thereto" (commonly referred to as anti-trust laws). A copy of the pertinent provisions of section 15 of the Shipping Act is submitted herewith for your reference.

It does not appear that the provisions of H. R. 2734 are intended directly or indirectly to affect the above-quoted exemption from the Anti-Trust Laws provided in section 15 of the Shipping Act. However, in view of the fact that the bill contains provisions specifically recognizing an exemption in respect of transactions approved by specified agencies under statutory authority, the Commission believes that the section in question

should be amended to exempt from section 7 of the Clayton Act, as proposed to be amended by the bill, the transactions approved pursuant to authority given by the Maritime Commission under statutory authority such as the aforesaid section 15 of the Shipping Act, 1916. This would avoid undesirable controversy which is likely to arise from any contention that the failure to include the Maritime Commission among the agencies specifically mentioned makes agreements approved by the Commission under section 15 of the Shipping Act of 1916, or other transactions approved under statutory authority of the Maritime Commission, subject to the provisions of section 7 of the Clayton Act.

Sincerely yours,

/s/ GRENVILLE MELLEN
Grenville Mellen
Vice Chairman

Enclosure

☆ U.S. Government Printing Office: 1973—493-705/48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, *Petitioner*

v.

SEATRAIN LINES, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY OF SEATRAIN LINES, INC. TO MOTION OF R. J. REYNOLDS TOBACCO COMPANY TO FILE BRIEF AS AMICUS CURIAE.

Seatrain Lines, Inc. objects to the motion of R.J. Reynolds Tobacco Company (Reynolds) to file an *amicus curiae* brief and respectfully requests that said motion be denied.

Under the Rules of the Supreme Court of the United States, the purpose of an *amicus curiae* brief is to present facts or questions of law related to the issues being reviewed which the *amicus curiae* believes will be inadequately presented by the parties (Rule 42(3)). The motion of Reynolds makes it clear that its purpose in filing as an *amicus curiae* is to argue matters beyond

the issues on review. Reynolds states that it desires to argue that an agreement with which it is involved is distinguishable from the agreement being reviewed in the instant proceeding. Alternatively, Reynolds wants to argue that this Court should decide in Reynold's favor the issue presented in the pending petition for a writ of certiorari in *R.J. Reynolds Tobacco Co., et al.* v. *United States and FMC,* No. 71-157 which is not an issue in the present proceeding. This announced purpose by Reynolds clearly does not comply with Rule 42(3) because Reynolds seeks to argue on issues not properly before the Court in the present proceeding and which are not necessary for argument or presentation at this time.

The proposed *amicus curiae* filing by Reynolds would unduly broaden the proceeding before the Court and would require the parties to address issues completely outside the ambit of the issues on review in this proceeding.

In view of this lack of compliance with Rule 42, and the clearly unnecessary broadening of issues involved in the *amicus curiae* presentation, we respectfully object to the filing of the *amicus curiae* brief by Reynolds and respectfully request that the Reynold's motion to file such brief be denied.

Respectfully submitted,

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February 16, 1973